BUSINESS UNITY SOUTH AFRICA

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BUSINESS SUPPLEMENTARY SUBMISSION ON THE COMPETITION AMENDMENT BILL FOLLOWING THE NEDLAC ENGAGEMENT ON 23 APRIL 2018

Introduction

At the Nedlac meeting held on 23 April 2018, a dialogue took place between the Economic Development Department (EDD), headed by Minister Patel, Organised Labour and Business with a view to reaching greater understanding and consensus on key issues emerging from initial engagements on the Competition Amendment Bill.

Business recognises the importance of finding the right balance between firmly addressing anti-competitive practices and behaviour; dealing with markets that are exclusionary; and stimulating competitive practices to enable investment and growth in the economy. When reflecting on the Nedlac dialogue, however, we are concerned that this balance may be disproportionately weighted against enabling competitive practices between businesses.

The dialogue was conducted thematically, and what follows is business' updated position in light of the recent Nedlac engagement.

Yellow card

The yellow card regime provides for an area of less prescriptive regulation in cases where conduct is not automatically identified as anti-competitive. We regard it as necessary to maintain provision in the legislation for such borderline conduct to be scrutinised and strengthened, but for the treatment thereof to be differentiated from clearly anti-competitive behaviour.

Business's previous position on the proposed withdrawal of the "yellow card" regime was as follows:

Business is of the view that the Yellow Card regime should remain in place. This applies equally under Sections 4(1)(a), 5(1), 8(c) and 9(1). Implicit in this is that the catch all wording of the current Section 8(c) should remain in place.

Business submits that a lot more clarity could be provided through the Commission issuing detailed Guidelines on horizontal and vertical arrangements, along the lines seen in Europe. Where a firm consistently acts outside the Guidelines, that would be an aggravating factor to be taken into account in assessing its behaviour.

Business suggests the further concession specified in its 14 February submission, that the Yellow Card protection would fall away once the Competition Tribunal or Competition Appeal Court has issued a final judgment that particular conduct under one of the relevant sections is prohibited. That would bind other firms in relation to the same or similar conduct, going forward.

To recap, BUSA suggests that the current Section 59(1)(b) be amended to read as follows:

> *"… for a prohibited practice in terms of section 4(1)(a), 5(1), 8(c) or 9(1) only if the conduct is substantially the same as conduct which has previously been found by the Competition Tribunal (not by way of a consent order) or the Competition Appeal Court to be a prohibited practice and in relation to conduct which has continued after the relevant finding has been made public."*

The EDD suggested that business should be penalized for what it regarded as vexatious or frivolous litigation in this context – Business reconfirms that it does not know of cases where firms are actively evading their legal obligations under the "yellow card" provisions. But Business readily agrees that any vexatious or frivolous litigation by any party should be discouraged and, in this regard, suggests a modification to Section 57 as follows:

Amendment to Section 57 – Costs

To take account of concerns about vexatious or frivolous litigation, but without detracting from the general principles that parties should bear their own costs and that the Commission, as regulator, should not be deterred from doing its job, Business proposes amendments to Section 57 of the Act, on the basis set out below.

Section 57(1) should read as follows:

> *"Subject to subsections (2) and (3) and the Competition Tribunal's rules of procedure, each party participating in a hearing must bear its own costs." (Insertions are underlined)*

Section 57(2) will remain unchanged.

A <u>new Section 57(3)</u> should be inserted as follows:

> *"(3) Notwithstanding subsections (1) and (2) the Competition Tribunal shall have the power to award costs, including costs on a punitive scale, against any party to proceedings before it, in the event that:*
>
> *(a) the party concerned is found to have conducted its participation in the proceedings in a frivolous or vexatious manner; or*
>
> *(b) taking into account all the relevant circumstances, and acting reasonably, the Tribunal determines that it would be just and equitable for costs to be awarded against a particular party."*

Following the discussion on 23 April 2018, Business is willing to consider revising the above position to do away with the "yellow card" in respect of Section 8(c) only (exclusionary abuses of dominance). As discussed at the Nedlac engagement, there are a number of pro-competitive joint ventures between parties that may be undermined should contraventions of section 4(1)(a) attract a first-time penalty. It is also remarkably difficult for companies, given the complex analysis which is often required to determine whether or not a particular course of conduct may give rise to a contravention of sections 4(1)(a), 5(1), 8(c) or 9, to determine whether or not the conduct in question may give rise to a potential contravention of the relevant provisions. However, Business maintains its opposition to the withdrawal of the yellow card for Sections 4(1)(a), 5 and 9 offences.

Business remains of the view (as discussed) that the limited grounds of exemption should be expanded to provide the Competition Authorities with greater powers to grant extensions in relation to efficiency enhancing arrangements between competitors.

Business understands from the recent discussions that there was broad agreement on the principle of awarding costs for vexatious litigation and in this regard, the proposed insertion of Section 57 (3) above is put forward for consideration.

Section 8: Monopsony provisions

On the proposed monopsony provisions, Business's position has been articulated in previous submissions. Business understands that EDD will propose revised wording in this regard.

Section 9: Price discrimination

Business understands that a principle-level consensus emerged in relation to the proposed amendments in relation to price discrimination between constituencies. Business appreciates and supports the Minister's objective behind the proposed amendments to this section to address the potential effects of anti-competitive price discrimination on small, medium and micro enterprises (SMMEs) and firms controlled by historically disadvantaged individuals (HDIs). Business' concerns are centred around the move away from the existing test of establishing a substantial lessening of competition (SLC). The proposed amendment of the test to be applied could give rise to additional burdens in a situation where it has been suggested that a first-time contravention of section 9 could expose the firm in question to the risk of the imposition of administrative penalties (if the so-called yellow card is removed in relation to section 9). For this reason, Business would be supportive in principle to provisions that specifically protect small businesses and firms owned by HDIs, whilst retaining the overall SLC test. Business understands that the EDD will propose wording to this effect for further consideration and discussion.

Section 8(2): Shifting of evidentiary burden

To reiterate, it is Business's position on the above that the Amendment Bill should clarify that a respondent will only be found to have contravened section 8 of the Competition Act if, on a balance of probabilities, the anti-competitive effects of the conduct outweigh the pro-competitive effects. In the complex economic assessments usually required in abuse of dominance cases, it is important for respondents and the adjudicative body to understand the standard of 'proof' required. In other words, if on a balance of probabilities, the Competition Tribunal assesses that there is a 50% likelihood that the evidence demonstrates that the net effects of the conduct are in fact pro-competitive, the Competition Tribunal should find in favour of the respondent and not the complainant.

In terms of the Amendment Bill, the Competition Commission could essentially refer a complaint without having conducted a substantive investigation. This could lead to spurious and unjustified litigation, which disproportionately prejudices dominant entities. Accordingly, introducing adverse costs orders against the Competition Commission could serve as a sufficient sanction to ensure

that all cases referred to the Competition Tribunal are based on good investigative work by the Competition Commission. The Competition Tribunal may retain the discretion whether to make an adverse costs order and this discretion should be exercised in a manner which does not deter the Competition Commission from discharging its public duties. Including adverse costs orders will also likely result in more settlement agreements being concluded expeditiously alternatively referred to trial for prosecution (should no settlement be forthcoming). The expeditious resolution of complaints is not only mutually beneficial for all parties involved in the complaint but will also be favourable for civil litigants who may potentially have damages claims. The delay in concluding investigations is a significant impediment to follow-on damages claims. Equally important is the fact that decisions which are made by the Competition Tribunal and Competition Appeal Court also provide guidance to the public and the Commission and can allow parties to bring their conduct into line with the Act based on the detailed explanations which are provided in giving judgment in respect of complaint proceedings.

To the extent that the reverse onus provisions are retained, the Amendment Bill should at least introduce an “effects based” test for dominance (such as those adopted by the European Commission during its modernisation agenda) so as to ensure that such reverse onus is only placed on firms that are truly dominant and do not simply have a large share in the domestic market.

Business understands that EDD will propose wording that seeks to take into account Business’ concerns.

Fines and penalties

Business accepts that proven anti-competitive behaviour should be penalised, as is the case in other jurisdictions. Fines and penalties should send a strong message that deters anti-competitive practices.

Business understands that in-principle agreement was reached on the principle of harsher penalties for second offences, and to extend liabilities to holding companies in the same group where knowledge of wrongdoing has been proven.

Business reiterates its opposition to any increase in the current statutory cap of 10% of turnover in respect of fines and penalties as this may serve as an unintended disincentive to investment as the risks of doing business would be regarded as too severe relative to other jurisdictions.

Market inquiries

Business understands the necessity to hold market enquiries in order to investigate and create the platform to address anti-competitive market structures, particularly where these have been the result of historical factors. Alongside this important imperative is the need to create a conducive market in which to compete and do business. A balance must be struck between creating the space to address market concerns and ensuring that the market is functioning effectively for all firms – both established and new entrants – in the market.

Business has maintained its opposition to the proposed market inquiry provisions in the draft Bill. To summarise:

i. The Commission may impose far reaching binding remedies following a market inquiry (i.e. structural, pricing or other behavioural remedies) on a no-fault basis (i.e. without a finding of any wrongdoing by any firm);

ii. The competition test which is applicable in mergers and complaints has been watered down significantly from a "substantial lessening of competition" to an "adverse effects". This is a matter of significant concern since it allows the Commission to intervene in markets in which it considers there to be a restriction, lessening or prevention of competition to impose remedies that may change the structure and terms of supply and demand in a market in circumstances where there has been no breach of the Act by any firm. This should mean that the threshold for intervention should be higher rather than lower, or at the very least equivalent to the standard applicable in so-called conduct cases (complaint proceedings). Ex post intervention by the Commission is by its nature focused on the particular conduct of a specific firm or firms. The fact that a market inquiry is not focused on such conduct is not a basis for the introduction of a lower threshold for intervention by the Competition Authorities;

iii. The Tribunal has limited oversight of the process and is, on the current proposed wording, only empowered to confirm any divestiture order proposed by the Commission. An important safeguard has therefore been removed not only to guard

against a potential abuse of process but as a specialised adjudicative body the Tribunal has the requisite skill to grapple with complex matters which inherently arise from market inquiries and most importantly, is well placed to objectively engage in the exercise of balancing whether or not proposed remedies are proportionate and reasonably required to address any identified harm to competition.

With due regard to the objectives of the amendments and the positions of the various constituencies articulated at Nedlac, Business has revised its position on the matter a number of times with a view to compromise. Business is of the view that any further concessions in this regard will weigh against the interests of a competitive market. Business accordingly proposed the following framework in terms of which market inquiries should be conducted in a workable manner that balances the interests of the Commission and business:

i. ***Overarching Market Inquiry Scheme***

Business's submission is that the market inquiry framework should be akin to that of large merger proceedings in terms of which the Commission is mandated with initiating and conducting a market inquiry and, thereafter, make recommendations to the Tribunal regarding any potential remedies.

Market participants who may potentially be materially affected by any proposed remedies would be entitled to challenge the Commission's findings and/or challenge the Commission's recommendations before the Tribunal. The Tribunal hearing will not be a hearing *de novo* but rather, the basis of the hearing will proceed from the Commission's record compiled as part of the market inquiry. The Tribunal has its normal discretion to curtail the issues before it and may issue directions in relation to the admissibility of evidence which does not form part of the record. Likewise, the Tribunal may exercise its discretion in relation to permitting third party intervenors, as third-party intervention should be limited as far as practically possible.

Furthermore, Business proposes that no binding remedy may be imposed on any market participant(s) absent a finding by the Commission (and confirmed by the Tribunal) that the remedy is required to address a substantial lessening of competition in the market.

ii. ***Market Inquiries in Relation to Regulated Sectors***

Business recognises the respective roles of the Regulator in certain sectors, as well as the Competition Commission. Having due regard to the respective roles, Business submits that the market cannot be subjected to duplicated inquiries and processes as this creates significant uncertainty, inefficiency and costs and can lead to inconsistent outcomes. A preferred approach will be to have clearly delineated roles for the Regulatory and the Competition Commission in market enquiries in regulated sectors.

Currently, there is considerable overlap between the powers of the Competition Commission and (certain) sector regulators. Market inquiries under a no-fault basis are akin to *ex-ante* regulation where the objective is to impose pro-competitive measures. Where sector regulators already have the powers to do this, there is no economic or legal basis for the Competition Commission to do the same. The desired socio-economic objectives of the country can be achieved through sector regulation. Most statutes in regulated sectors already provide for consultation with the Commission in such processes and the Commission can participate in such processes as it has done in the past e.g. in telecommunications and broadcasting inquiries. Market inquiries are often extensive, expensive processes for firms who bear the costs associated with ensuring legal and economics representation as well as the extensive management time diverted to deal with these. Duplication of inquiries also impose socio-economic costs on the economy and on the fiscus since regulators also expend significant resources and time on these. It is therefore important that such duplication be avoided.

Business submits that Government, the market and the public may be better served by ensuring that sector regulators are properly capacitated with a clear role for the Competition Commission in the process, rather than having duplicated processes which may even result in mandate creep and tension between regulatory agencies. Further, the duplicated processes can be prejudicial to firms with potentially different standards of assessment being applied by each regulator to the same issues. Such outcomes and the potential risk of such outcomes is likely to be more damaging to the economy. Given that sector regulators have a deeper knowledge and expertise in relation to the sectors which they regulate, they are better placed to deal with such inquiries than the Commission. The Commission on the other hand would have to spend a great deal of time and resources developing its knowledge of the intricacies of a sector as well as understanding the relevant regulatory framework while engaged in a market inquiry. This contributes and has contributed to the lengthy time periods it takes for the Commission to

complete market inquiries. In respect of regulated sectors, the Commission's focus should remain on investigating, prosecuting and addressing *ex post* contraventions of the Competition Act by firms in such regulated sectors. Proposed potential wording to cater for this exception is as follows:

Section 43B(1A)

- *The Competition Commission shall not initiate nor undertake a market inquiry in regulated sectors where the regulatory authority has:*

(a) a mandate to undertake ex-ante market inquiries into competition and public interest matters; and

(b) powers to impose pro-competitive remedies.

- *The Competition Commission may participate, provide advice or assistance in a market inquiry initiated by a regulatory authority into competition matters in terms of the provisions of their respective statutes or as an interested party.*

However, Business is open to considering an alternative formulation whereby the Competition Commission has authority of regulated sectors, provided that the role of the Regulator is clearly defined.

iii. ***Market Inquiry Trigger Threshold***

Business understands from the bilateral held with EDD that government wishes to limit restrictions on the commencement of market inquiries, particularly in the event that the Commission will be tied up in litigation at the commencement stage of an inquiry. In addition to our general comments on market inquiries, business proposes for practical reasons that two stages be built into the market inquiry process. In this conception, "Stage 1" would consist of an initial fact-finding mission by the Commission in order to ensure that it understands at a high level the market structure and key features of the market. This information, to be obtained by way of RFI's, should essentially aim to provide the Commission with a better understanding in relation to the following:

- Whether market concentration (as set out, for example, in the HHI) had increased to the levels that would raise a concern as to a prospective merger;
- Whether the firms remaining in the market are providing better value for consumers due to technological and global changes;
- Whether the firms remaining acquired their market share due to internal growth that was fuelled by competitive advantages such as product innovation; and
- Whether to the extent corporations are earning significant profits, there are barriers to entry that prevent entry by small or historically disadvantaged businesses who would otherwise be attracted into that market by those profits.

Based on the responses received from the key market participants in relation to the above, the Commission would be better placed to assess whether a market inquiry is justified. Should the Commission, after considering the responses received and after having applied its mind to the responses be of the view that there are reasonable grounds for it to believe that the market contains anticompetitive features, the Commission may proceed to "Stage 2" which is a 'full blown' market inquiry.

Of possible contention in relation to the above proposal is whether the Commission's decision to move from stage 1 to stage 2 is a reviewable decision and if so, on what grounds.

As a potential *via media*, business proposes that the Commission's decision to move from phase 1 to phase 2 is not reviewable (at least not on any higher threshold than to review the Commission's decision to investigate a complaint) but that it is an important factor which the Tribunal should take into account when assessing whether to make an adverse costs order against the Commission

Mergers

The merger provisions need to retain the space for businesses to adapt, change and adjust so as to optimise investment, competitiveness and productivity. Business is concerned that provisions in this regard should not inadvertently deter desirable competitive practices.

On 12A(2)(k), and Business' concerns regarding the ambiguity of the proposed wording, Business maintains its position that the wording requires substantial revision to avoid any possibility of ambiguity. Business understands from EDD that the intention of the proposed amendment is not to allow for the unwinding of past mergers, but rather to bring to light ownership patterns in the markets relevant to the merger in question. In this regard, business agrees to the principle of formalising this as part of standard notification requirements. Business understands that EDD is working on proposed wording that captures the consensus reached.

Role of the executive

Business believes it is important to demonstrate the impartiality and independence of the Commission from the Executive, as well as to ensure that the Commission is adequately capacitated and structured to achieve its objectives.

On the proposed amendment to Section 26 (2) of the Act, which envisages that the Minister be entitled to appoint "*acting part-time*" members to the Tribunal, Business proposed that the provision should either be removed or at least be subjected to significant limitations. Business indicated that the current amendments would allow the Minister to appoint any number of persons that meet the requirements of section 28 to be members of the Tribunal, for an indefinite term (since the Minister may determine the period for this appointment and also re-appoint that member upon expiry of that member's term of office). This would jeopardise the separation of powers between the Minister and the Tribunal and could result in a substantial undermining of institutional trust, independence and objectivity. Business indicated that, to the extent that the proposed amendments are retained, the power to appoint acting part-time members of the Tribunal should rest with the Chairperson of the Tribunal. Business contended that there is a potential for abuse with respect to "case specific appointments" that deviate from strict neutrality. Accordingly, business proposed that the Tribunal gain more part time members (subject to comprehensive vetting) that can be flexibly assigned to cases as required, rather than the Minister hiring a specific Tribunal member on an ad-hoc basis. It is Business's understanding that the EDD has considered Business's comments and agreed to proposals in this regard, with proposed wording to follow.

In relation to the Ministers' right to access confidential information, Business proposed that this entitlement be removed from the Amendment Bill in its entirety as the current mechanism which permits interested parties' access to confidential information is sufficient. Furthermore, this

entitlement should be in relation only to the Minister of Economic Development. To the extent that the proposed amendments are retained, the Amendment Bill should expressly cater for circumstances in which private companies compete with state owned enterprises as private firms would essentially be making available highly confidential and competitively sensitive information to an actual or potential competitor. In addition, Business proposed that to the extent that the proposed amendments are retained, the Minister should be required to motivate for the access to particular confidential information on the basis that the Minister would be unable to meaningfully participate in the proceedings otherwise, with Ministerial access limited to those portions of the confidential information which is necessary (for the purposes of the Act), and that the information may only be used by the Minister for the purposes of participating in the relevant merger proceedings. It is Business's understanding from the Nedlac engagement on 23 April 2018 that EDD has agreed to limiting access to confidential information to the Minister of Economic Development, with proposed wording to follow.

With regard to the right of the Minister and Commission to appeal decisions, business argued that there should be no right for the Commission to appeal, particularly given that the Amendment Bill provides no guidance in respect of potential conflicting views which may arise between the Competition Commission and the Minister of Economic Development and how this conflict is to be resolved in the "decision making process". In any event, Business is of the view that the proposal to confer a right to appeal on the Commission would undermine the structure of the hierarchy of Commission Authorities created by the legislature and would have the effect of prolonging merger proceedings. In order to address the concerns raised regarding the potential violation of the separation of powers principle, the Amendment Act should provide further clarity as to the precise role and scope of the executive in the "decision making process". With a view to a compromise proposal, Business proposed that the Minister's right to appeal should be limited to public interest matters only and only to mergers where the Minister has participated fully. Business therefore proposed the following wording:
"*17(1)(A) Within 20 business days (which period may not be extended), the Minister may, after notice of a decision of the Competition Tribunal in terms of section 16, appeal such a decision to the Competition Appeal Court (subject to its rules), provided that (i) the Minister's appeal is limited solely to public interest considerations and (ii) the Minister may only appeal in the event that the Minister participated both in the Commission's investigation and the Tribunal proceedings*".

It is Business's understanding arising from the Nedlac engagement of 23 April 2018 that EDD will propose wording that seeks to limit the right of the Minister to appeal on public interest grounds only. While Business welcomes this, Business maintains its opposition to the right of the Commission to appeal decisions of the Tribunal.

Strategic veto

On Labour's proposal on the insertion of a clause allowing for a "strategic veto", business has no in-principle objection to the notion, given the fact that there are similar provisions which have been adopted in comparable jurisdictions. However, Business proposes that any process contemplated in this regard should have certain safeguards built in, particularly given the criticism levied at the implementation of similar provisions in the United States. In particular the process should be transparent and any so-called "strategic veto" should be strictly limited to national security and / or critical infrastructure. Furthermore, given the existing changes to competition law contemplated by the current Bill, Business proposes that the creation of a strategic veto not be rushed to allow time for the market to adjust to any changes in the local competition regime.

Elevation of employment

On Labour's proposal to include "employment" in Section 1 of the Bill, Business aligns itself with the view that the purpose of Competition Law should be focused on promoting competition and preventing anti-competitive behaviour.

Business reiterates its view that the Labour Relations Act (LRA) s197 provides clear guidance and protections for terms and conditions of employment that will apply in the case of mergers.

Notification of mergers

On Labour's proposed 13A (2) (notification of mergers), Business disagrees with the proposed amendment for subsection (a) and proposes that the existing wording be retained. The proposed amendment by Labour would impose unduly onerous obligations on businesses that have already frequently experienced difficulties in this regard.

Conclusion

We understand that there will be a final Nedlac meeting with the objective of concluding the Nedlac process on the Bill, which will culminate in a Nedlac report reflecting maximum areas of agreement between social partners.

As stated at the outset, we recognise the difficult task of finding the right balance between firmly addressing anti-competitive practices and behaviour; dealing with markets that are exclusionary; and stimulating competitive practices to grow investment and the size of the economy. The proposals set out above are aimed at finding such solutions, while signalling areas that we believe have gone too far and will stunt competitive forces rather than provide an environment and investment climate in which to activate them.

We have indicated in this submission a number of areas where we understand progress is being made, but at this stage lack sufficient clarity to understand government's position. Business looks forward to receiving a revised version of the Bill, or a text that documents the proposals from government in this regard in order to engage constructively thereon.

We appreciate the opportunity to provide input to the Bill and will continue to engage with the view to strengthening the legal framework in the interests of inclusive growth and a competitive economy.